Pacific Maritime Association *and* Eric Aldape.
International Longshore and Warehouse Union, Local No. 13, AFL–CIO (Pacific Maritime Association) *and* Eric Aldape. Cases 21–CB–014966 and 21–CA–039434

September 14, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 26, 2011, Administrative Law Judge John J. McCarrick issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, Respondent Pacific Maritime Association (PMA) and Respondent International Longshore and Warehouse Union, Local No. 13, AFL–CIO (Union) each filed an answering brief, and the Acting General Counsel filed a reply brief. Additionally, PMA filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.

Background

PMA and the Union are parties to a collective-bargaining agreement called the Pacific Coast Longshore Contract Document (PCLCD). The PCLCD is administered at the ports of Long Beach and Los Angeles, California, by a Joint Port Labor Relations Committee (Joint Committee), on which local employers and the Union have equal representation.

The PCLCD establishes the procedure to be used in the event that an employee complains of harassment or discrimination.[1] Section 13.2 of the PCLCD provides for employees complaining of discrimination or harassment based on race, creed, color, sex, age, national origin, or religious or political beliefs to file a grievance form with the Joint Committee or directly with the Southern California area arbitrator.[2] David Miller was the area arbitrator for Southern California at all relevant times. The arbitrator must hold a hearing to determine if there is merit to the grievance and is required to issue a written decision within 14 days of the hearing. The arbitrator's decision is final unless it is appealed to the coast appeals officer. Rudy Rubio was the coast appeals officer at all relevant times. Rubio may affirm, reverse or modify the arbitrator's decision and the penalties imposed by the arbitrator. Rubio's decision is final and may not be appealed. The Joint Committee is required to implement the remedies contained in the final decision.[3] Records are kept of section 13.2 proceedings, but the proceeding may not be used against the charged party in any future hiring action or other proceeding when there is a finding of not guilty.

This case involves three separate grievances processed under section 13.2 of the PCLCD.

Droege Grievance

Margarite Droege filed a grievance on September 10, 2009,[4] alleging that employee Eric Aldape discriminated against her based on her sex.[5] Area Arbitrator Miller found that Aldape had violated section 13.2 of the PCLCD. Aldape appealed the decision to Rubio, who denied the appeal and imposed a discipline of 30 days off work, with 15 of those days suspended.

The complaint alleged that the Union violated Section 8(b)(1)(A) of the Act through its "implementation" of the arbitrator's decision regarding the grievance filed by Droege. The judge dismissed this allegation, finding that the facts concerning this grievance and arbitration fall outside the 10(b) period. We agree and adopt the dismissal, for the reasons stated by the judge.[6]

[1] As discussed more fully infra, the lawfulness of the procedure as written is not at issue.

[2] If filed with the Joint Committee, the Committee forwards the grievance to the arbitrator with no review.

[3] Another section of the PCLCD addresses grievances alleging incidents of harassment or discrimination based on other factors such as disability, medical leave status, veteran status, political affiliation, or "membership or non membership in the Union, or activity for or against the Union or absence thereof." These grievances are processed under a different set of procedures, which require that grievances be filed with the Joint Committee. The Joint Committee has initial responsibility for attempting to resolve those types of grievances. If there is no resolution at the Joint Committee level, the parties may refer a grievance to a higher authority, including an arbitrator.

[4] All dates are in 2009 unless otherwise indicated.

[5] This grievance was based on a handbill written and distributed by Aldape which suggested that one of Mark Jurisic's children had failed a drug test but still retained an active casual card. At the time, Jurisic was an executive board member and had two sons and a daughter (Droege) working as casual longshore workers.

[6] Because we are dismissing the complaint as it relates to the Droege grievance and arbitration on Sec. 10(b) grounds, we find it unnecessary to reach the judge's alternative finding that Aldape's activities were unprotected.

The record shows that Jurisic was a member of the Union's executive board in September 2009, and we agree with the Acting General Counsel that the judge erred in finding that Jurisic was not a Union officer at that time. This inadvertent error has no effect on the outcome, however, as it has no impact on the judge's 10(b) analysis.

Bebich Grievance

On September 24, Aldape left a profanity-laced voice mail message for fellow employee Steven Bebich. In the expletive-laced message, Aldape threatened to reveal personally embarrassing facts about Bebich.[7] Bebich filed a section 13.2 grievance on October 2, alleging that Aldape engaged in discrimination or harassment based on race, sex, political beliefs, and "prohibitive conduct" by leaving the message.[8] Arbitrator Miller found that Aldape violated section 13.2 of the PCLCD and assessed a penalty of additional days off work and confinement to the first shift for 2 years. The Joint Committee administered the discipline through its operation of the dispatch hall.

As to this grievance and arbitration, the complaint alleges that the Union violated Section 8(b)(1)(A) through its "involvement" in the prosecution of the grievance filed by Bebich; through its "implementation" of the discipline ordered by the arbitrator; and by keeping records related to the grievance and arbitration process. The judge dismissed those allegations based on his finding that Aldape's activity in leaving the message was unprotected under Board precedent. We affirm, but only for the reasons stated below.[9]

On the record before us, the Acting General Counsel has failed to establish that Aldape's message constituted protected concerted activity under Section 7 of the Act. First, the evidence is insufficient to establish that Aldape's message itself amounted to the sort of intraunion activity that the Act protects, as opposed to a purely personal attack. There is some suggestion in the record that Aldape and Bebich had some internal union political history together. But, at the time Aldape left his message for Bebich, Bebich was merely a union member; he was not an officer and there is no evidence establishing that he was a candidate for any office.[10] Thus, Bebich was not part of the union leadership representing Aldape, nor, so far as the record shows, was Bebich playing any role in setting union policy. As a result, there appears to be no basis for concluding that Aldape was attempting to "change current policies of the union which represents him or to politically oppose an incumbent officer of that union." *Teamsters Local 186 (Associated General Contractors)*, 313 NLRB 1232, 1234–1235 (1994); see also *Roadway Express*, 108 NLRB 874, 875 fn. 3 (1954), enfd. sub nom. *NLRB v. Teamsters Local 823,* 227 F.2d 439 (10th Cir. 1955).

Second, the Acting General Counsel has not established that Aldape's message—even if we were to assume some protected purpose—was concerted, as the Board defined it in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *Meyers Industries,* 281 NLRB 882 (1986) *(Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers Industries*, the Board distinguished between an employee's activities engaged in with or on the authority of other employees (concerted) and activities engaged in solely by and on behalf of the employee himself (not concerted). Here, Aldape left the message on his own behalf, and only Bebich had access to the message. There is no evidence that Aldape was acting on the authority of, or with, other employees, or that he was seeking to initiate, induce, or prepare for group action. Cf. *K-Mart Corp.*, 341 NLRB 702, 703 (2004).

Realini Grievance

On about May 16, 2010, Aldape published and distributed a handbill entitled "Ex Officers Family a Mechanic That's Why There Is No Panic." The handbill was critical of the way that the dispatch hall dispatched mechanics. Employee Wallace Realini filed a grievance against Aldape on May 19, 2010 alleging harassment based on political beliefs due to the flyer. There is no showing that Realini was acting as an agent of the Union at the time he filed the grievance or that he filed the grievance with any discriminatory motive. Arbitrator Miller dismissed the grievance after a hearing, finding that there was no factual basis to support a finding that Aldape violated section 13.2 of the PCLCD.

The complaint alleges that PMA and the Union violated Section 8(a)(1) and 8(b)(1)(A) of the Act, respectively, through their "involvement" in the prosecution of the grievance filed by Realini and by keeping records related to the grievance and arbitration. The judge found no violation because he found that Aldape's actions in publishing and distributing the flyer were not activities protected by Section 7 of the Act.

We assume, without deciding, that Aldape was engaged in protected concerted activity when he distributed the flyer. Nevertheless, we adopt the judge's dismissal

[7] The full text of Aldape's message is contained in the judge's decision.

[8] There is no indication that Bebich's filing of a grievance was in any way instigated or supported by the Union.

[9] We adopt the judge's dismissal without reference to his discussion of *Office Employees Local 251 (Sandia National Laboratories)*, 331 NLRB 1417 (2000).

[10] Bebich had recently run for the office of Secretary-President in Union elections held on September 8–10, but his bid was unsuccessful. Bebich could not recall whether he was a candidate for caucus delegate during the relevant time period.

of the allegations related to the Realini grievance and arbitration for the reasons stated below.[11]

Significantly, as noted above, the Acting General Counsel is not challenging the lawfulness of section 13.2 of the PCLCD as written, and we do not pass on whether we would find merit to such an allegation. The critical issue here is simply whether the section 13.2 procedures, as applied in these particular circumstances, infringed on Aldape's Section 7 rights. Realini submitted his grievance directly to the neutral, third-party arbitrator who, pursuant to the procedures in the PCLCD, held a hearing to determine if there was merit to the grievance.[12] Finding there was no merit, the arbitrator dismissed the grievance. There were no further proceedings, and no discipline was ordered or imposed as a result of the grievance and arbitration. On the record here, we cannot conclude that the hearing alone is a proper basis to impose unfair labor practice liability on the Respondents.[13]

[11] We again adopt the judge's dismissal without reference to his discussion of *Sandia Natl. Laboratories*, supra, 331 NLRB 1417.

[12] The fact that the grievance was submitted directly to the arbitrator distinguishes this case from *Consolidated Diesel Co.*, 332 NLRB 1019 (2000), where the Board found that an employer had violated Sec. 8(a)(1) by subjecting two employees, after a harassment complaint from a fellow employee, to its investigation procedures for which permanent records were maintained. Our finding of a violation in *Consolidated Diesel* was not based on the employer's initial investigation of the harassment charge, but on the employer's "continuation of its investigation . . . after the Respondent's initial investigation by its Human Resources Department disclosed that the employees had engaged in an exercise of their right[s] . . . in a manner which clearly did not lose the Act's protection." Id. at 1020. By contrast, neither the Union nor PMA here engaged in any investigation of Aldape's conduct or made any decision to subject Aldape to the grievance/arbitration process.

[13] Our holding is limited to the facts found and the arguments presented in this case. A grievance-arbitration system established by an employer and a union might well result in liability under the Act if it were demonstrated that it was reasonably foreseeable that employees could be subject to adverse employment consequences, under the system, for engaging in Sec. 7 activity. Here, sec. 13.2 of the collective-bargaining agreement does not, on its face, reach Sec. 7 activity, but it was interpreted more broadly by an arbitrator, who apparently gave no consideration to the Act or its policies and was not obligated to do so. Depending on the circumstances, a prosecution—or repeated prosecutions—under the grievance-arbitration system could have a chilling effect on Sec. 7 activity even if adverse employment consequences were not ultimately imposed. Accordingly, a grievance-arbitration system that effectively permitted employees to be prosecuted for engaging in Sec. 7 activity would raise serious questions under Sec. 8(a)(1) or 8(b)(1)(A), regardless of the lack of direct involvement in the proceedings by the parties responsible for creating and maintaining the system. The parties' tolerance of such a system could conceivably give rise to a duty to fix it or be held responsible for the resulting infringement on Sec. 7 activity. The Acting General Counsel, however, advances no such theory here.

Member Hayes finds no need to pass on this hypothetical issue.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. September 14 , 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David Reeves, Esq., for the General Counsel.

Eric Adalpe, Pro se., Clifford D. Sethness, Esq. (Morgan, Lewis & Bockius LLP), of Los Angeles, California, for Respondent PMA.

Gillian Goldberg, Esq. (Holguin, Garfield, Martinez & Quinonez), of Los Angeles, California for Respondent ILWU.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on July 18 and 19, 2011. The charge was filed August 4, 2010, and the consolidated complaint was issued on April 29, 2011.

The consolidated complaint (complaint) alleges that Pacific Maritime Association (PMA) violated Section 8(a)(1) of the Act by its involvement in prosecution of a grievance filed by Wallace Realini against charging party Eric Aldape (Aldape) under section 13.2 of the collective-bargaining agreement between PMA and International Longshore and Warehouse Union, Local No. 13, AFL–CIO (ILWU).

The complaint also alleges that ILWU violated Section 8(b)(1)(A) of the Act by its involvement in prosecution of three grievances against Aldape under section 13.2 of the collective-bargaining agreement, by implementing penalties against Aldape pursuant to the grievances and by maintaining records of the grievance proceedings.

Respondents filed timely answers to the complaint stating they had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the counsel for the Acting General Counsel, for ease of reference herein General Counsel, and Respondents, I make the following findings of fact.

I. JURISDICTION

The parties stipulated[1] that during the 12-month period ending December 31, 2010, a representative period, employer-members who participated in association bargaining through the PMA in conducting their business operations within the State of California at harbors along the West Coast of California, including those in the vicinity of Long Beach and Los Angeles, California, derived revenues in excess of $50,000 for furnishing or functioning as essential links, including providing longshore and stevedoring services, in the transportation of passengers and freight from the State of California directly to points outside the State of California.

Based upon the above, Respondent PMA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the act.

II. LABOR ORGANIZATION

Respondents admitted and I find that the ILWU is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The essential facts in this case are not in dispute and the parties have stipulated to most of the facts. [2]

The PMA, on behalf of its employer members who engage in the stevedoring business on the West Coast of the United States, engages in collective bargaining with the ILWU, on behalf of its longshore locals on the West Coast. That bargaining has resulted in a series of collective-bargaining agreements, the latest of which is entitled "The Pacific Coast Longshore Contract Document" (PCLCD), effective from July 1, 2008, to July 1, 2014. The PCLCD is administered at the ports by the Joint Port Labor Relations Committee (JPLRC) on which local employers in Long Beach and Los Angeles and ILWU, Local 13 have equal representation.

Section 13 of the PCLCD[3] deals with discrimination and harassment in employment. Section 13.1 provides in pertinent part that:

> There shall be no discrimination in connection with any action subject to the terms of this Agreement . . . either in favor or against any person because of membership or non membership in the Union, activity for or against the Union, or absence thereof, race, creed, color, sex . . . age . . . national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation or marital status. . . .
>
> Section 13.2[4] provides in pertinent part:
>
> All grievances and complaints alleging incidents of discrimination or harassment . . . in connection with any action subject to the terms of this Agreement based on race, creed, color, sex . . . age . . . national origin, religious or political beliefs, disability, protected family care or medical leave status, veteran status, political affiliation or marital status. . . shall be processed solely under the Special Grievance/Arbitration Procedures for the Resolution of Complaints Re Discrimination and Harassment under the Pacific Coast Longshore & Clerk's Agreement (See ILWU-PMA Handbook-Special Section 13.2 Grievance Procedures and Guidelines for Remedies . . .
>
> Section 13.3[5] provides in pertinent part:
>
> Grievances and complaints . . . and discrimination claims based on . . . membership or non membership in the Union, or activity for or against the Union or absence thereof, are not to be filed under the Special Section 13.2 Grievance Procedures, but instead are to be filed and processed with the Joint Port Labor Relations Committee (JPLRC) under the grievance procedures in Section 17.4 of the PCLCA.

The procedures to be followed by individuals filing complaints arising out of section 13.2 are set forth in the ILWU-PMA Handbook,[6] an addendum to the PCLCD. Unlike the grievance provisions for alleged contract violations under section 17.21 of the PCLCD,[7] an individual may directly file a Special Grievance under section 13.2.[8] Section 17 grievances are initially referred to the JPLRC, the joint PMA-ILWU committee. If there is no resolution at the JPLRC level, the parties may refer the grievance to a higher authority, including an arbitrator.

Under the provisions of the ILWU-PMA Handbook at section III "Detailed Special Grievance Procedures," an individual may file a grievance form with the JPLRC who forwards the form to the arbitrator, who must schedule a hearing to determine if there is merit to the grievance. At the hearing, the charged party is entitled to representation by the Union or a union member of their choice. The hearing is transcribed and witnesses and documentary evidence is presented. The Arbitrator is required to issue a decision within 14 calendar days. The Arbitrator's decision is final unless appealed within 15 days to the Coast Appeals Officer. The Coast Appeals Officer reviews the written record and may affirm, reverse, or modify the Arbitrator's decision. The Coast Appeals Officer's decision is final and may not be appealed. The JPLRC is required to implement the remedies contained in the final decision. According to Steve Fresenius, assistant area manager for PMA, while PMA maintains records of 13.2 proceedings, the 13.2 proceeding may not be used against the charged party in any future hiring action or other proceeding where there is a finding of not guilty.

ILWU Local 13 is an affiliate local union of the ILWU. ILWU Local 13 represents those bargaining unit members working under the PCLCD in the Ports of Long Beach and Los Angeles, and administers and enforces the PCLCD in those ports.

Aldape has been a member of Local 13 and has been employed at various PMA member employers in the ports of Long

[1] GC Exh. 7.
[2] Ibid.
[3] GC Exh. 6.
[4] Ibid.
[5] Ibid.
[6] GC Exh. 2.
[7] GC Exh. 6 at 87.
[8] GC Exh. 2.

Beach and Los Angeles as a crane operator for the past 13 years. Aldape has been active in Local 13 intraunion politics for a number of years since at least 2008.

Shortly before the union elections on September 8–10, 2009, Aldape authored a handbill entitled "This is my Style, the Click and their Cronies are in Denial."[9] In the handbill Aldape attacked union member Mark Jurisic. At this time Jurisic was not a union officer. In the handbill Aldape wrote:

> Mark are you going to let this membership know, what I already know? Did one of your family members fail the drug and alcohol screen test and does that same family member retain, a active casual card? (Yes or No). I know it is yes in my opinion.

Jurisic had two sons and a daughter working as casual longshore workers at the ports in Los Angeles and Long Beach. Margarite Jurisic-Droege (Droege) is Jurisic's daughter. Shortly after the handbill was published Droege saw a text message that said in part, "Mark Jurisic [sic]daughter failed her drug test & covered up by jurisic click! Eric will hit mic."[10] There is no evidence as to who sent this text message.[11]

In fact, unknown to Aldape at the time of his diatribe against Jurisic's family in September 2009, Droege had been sent a letter from the Joint Port Labor Relations Committee on March 27, 2007, indicating that she had failed to pass a drug and alcohol screening test that she had taken on March 23, 2007. When Droege received this letter she immediately requested a retest. On April 2, 2007, she was given a retest as a result of medical error on the first test that resulted in her passing the drug and alcohol screen.[12] It is undisputed that Aldape's allegation that one of Jurisic's children failed a drug and alcohol screen was based on rumor and innuendo.

Grievance SCGM-0005-2009 was filed by Margarite Jurisic-Droege on September 10, 2009.[13] It alleges that Aldape discriminated against Droege based upon sex in that he accused her of failing a drug test. In her grievance Droege states:

> I am Mark Jurisic's only daughter in this industry and I have never tested positive for drugs or alcohol in m life. Now my reputation has been smeared and I am humiliated. . . . I am humiliated and I cannot deal with this intimidation any longer. There is no other job in this country where a woman would be subjected to this kind of harassment. I am asking for this harassment to end immediately.[14]

Droege's grievance was heard by area arbitrator David Miller on September 24, 2009. Miller issued a decision on October 5, 2009, finding Aldape guilty of violating section 13.2 and assessing a penalty of 30 days off work with 21 days suspended, completion of diversity training, and confinement to the first shift until December 5, 2009. Aldape appealed this decision to the Coast Appeals Officer, Rudy Rubio, on October 16, 2009. Rubio issued his decision on October 27, 2009, denying the appeal and amending the penalty to decrease the amount of suspended days off to 15 from 21, thus increasing the days off work from 9 to 15.

On September 24, 2009, Aldape left a voice mail message[15] for Steven Bebich, a union member and political opponent of Aldape, full of profanity and a threat to expose wrongdoing by Bebich. The message states:

> Hey, what's up Mike? I heard you are coming out with a letter on me Bro. You've got no balls Bro. If you had balls you would have told me when you saw me today. Feel free to write that I am stupid bro. Just remember that I know about the fucking computer you stole, about why you got arrested. I don't have a problem writing it bro, to the membership bro. You've got my number you call me. Don't waste your time calling me write you're fucking shit bro I'll write my shit about you bro. You'll see that no one will waste their time picking up your fucking letter bro but you watch how many people pick up mine. Later.

At the time, Bebich was not a union officer.

Grievance SCGM-0009-2010 was filed by Steven Bebich on October 2, 2009, alleging that Aldape engaged in racial and prohibitive discrimination or harassment based on the September 24, 2009 voice mail. Bebich stated in his grievance:

> I believe that Mr. Aldape has violated my rights by threatening to reveal confidential information about me. Information that he had never substantiated nor does have any firsthand knowledge of. What Mr. Aldape is attempting to do is nothing less than blackmail. . . . I am asking that you hear this complaint under section 13.2 because I believe that Mr. Aldape has verbally harassed me, created a hostile work environment and threatened me in a retaliatory manner.[16]

Arbitrator Miller initially dismissed the grievance as not meeting the criteria of a section 13.2 violation, but Coast Appeals Officer Rubio, upon Bebich's appeal, remanded the grievance to Miller for hearing. After hearing the case, Miller issued his decision on December 2, 2009, fining Aldape guilty of violating section 13.2. The penalty assessed called for the 15 days off, all work held in suspension by Rubio in the Droege case activated,[17] an additional 45 days off work, and confinement to the first shift for 2 years. Aldape appealed this decision to Coast Appeals Officer Rubio on December 17, 2009. On December 29, 2009, Rubio denied the appeal.

It is undisputed that Aldape's insinuations and threats to Bebich on September 24 were based upon rumor. The record reflects that Bebich was arrested in San Francisco but that the charges were dismissed. Bebich admitted that he was accused by his employer of stealing a computer but that this complaint was withdrawn. Aldape was unaware of any of these facts at the time he left his voice mail.

On about May 16, 2010, Aldape published a handbill entitled "*EX OFFICERS FAMILY A MECHANIC THAT'S WHY*

[9] GC Exh. 8.
[10] GC Exh. 3, at 71.
[11] Aldape denied sending the text.
[12] PMA Exhs. 1 and 2.
[13] GC Exh. 3.
[14] GC Exh. 3, at 108.
[15] GC Exh. 4, at 82.
[16] GC Exh. 4, at 6.
[17] GC Exh. 4, at 85.

THERE IS NO PANIC."[18] In the handbill, Aldape is critical of the way mechanics are dispatched. Aldape asserts he received no information about how mechanics were included in the Union or how they were elevated to A status for priority referral. No individuals were named in the flyer.

Union member and member of the Union's dispatch rules committee along with Aldape, Don Taylor testified that Aldape's May 16 flyer contained errors. However, Taylor's testimony did not establish any knowing false statements in the flyer.

Wallace Realini filed grievance SP-0009-2010 against Aldape on May 19, 2010, alleging discrimination or harassment based upon political beliefs due to Aldape's May 16, 2010 flyer. A hearing was held on June 1, 2010 and September 7, 2010. Miller found Aldape not guilty of a section 13.2 violation and dismissed the grievance on the ground that there was no factual basis to predicate a 13.2 violation.

Grievance SP-0002-2010 was filed by Mark Jurisic on March 6, 2010. On March 8, 2010 Miller dismissed the grievance as not meeting the criteria of section 13.2. No appeal was filed.

B. The Analysis

Counsel for the General Counsel alleges in the complaint that by both PMA (in the Realini grievance) and ILWU'S (in the Droege and Bebich grievances) involvement in the prosecution of the 13.2 grievances against Aldape, including allowing the processing of the grievances when they were aware that Aldape's conduct was protected by Section 7 of the Act, by ILWU's participation in the implementation of the penalties assessed against Aldape, and by PMA and ILWU's maintenance of the record of proceedings in the 13.2 grievances against Aldape, Respondents violated Sections 8(a)(1) and 8(b)(1)(A) of the Act respectively.

1. Section 10(b) of the Act

Before addressing the substance of this case, there is a procedural issue that has been raised by ILWU concerning the application of Section 10(b) of the Act to the portion of the charge dealing with the Droege and Bebich grievances. ILWU contends that the facts concerning both these grievances fall outside the 10(b) period. General Counsel contends that both grievances fall within the 10(b) period.

Under Section 10(b) of the Act a complaint may not issue based on conduct occurring more than 6 months before the filing and service of the charge. In the instant case the first charge was filed against ILWU by Aldape on June 1, 2010,[19] and served on June 2, 2010.[20] The charge alleges that ILWU violated Section 8(b)(1)(A) of the Act by discriminating against Aldape because of his protected internal activities. Thus, the 10(b) period runs from December 2, 2009.

Counsel for the General counsel contends that the 10(b) period runs from the date the arbitration award was effectuated in the Droege grievance, citing *Barton Brands*, 298 NLRB 976, 978 (1990); *Postal Service Marina Center*, 271 NLRB 397 (1984); *Hospital Employees (Smithfield Hospital)*, 275 NLRB 272, 274 (1985); and *Machinists Local 68*, 274 NLRB 757, 759 (1985).

In *Postal Service Marina Center* at 399–400 the Board held, that in determining when the 10(b) period commences it will focus on the date of an alleged unlawful act rather than the date its consequences become effective, provided that a final and unequivocal adverse employment decision is made and communicated to an employee. Applying a similar analysis in the context of an arbitrator's award in *Hospital Employees* (*Smithtown Hospital)* at 274, where the complaint alleged that the respondent union violated the Act by petitioning the state court to enforce an arbitrator's award that afforded recognition based on tainted cards, the Board held that the 10(b) period began to run when the respondent filed the petition and not on issuance of the award.

In *Barton Brands*, the Board distinguished *Postal Service Marina Center* where an arbitrator awarded an employee's conditional reinstatement on the condition he did not seek union office. The Board held that the arbitrator's award did not constitute an employment decision by the Respondent. Rather, it was not until the employee won a union office and the Respondent then discharged the employee was the award effective. The Board held the Respondent was not compelled to discharge the employee on his election to union president. The Board noted that the conduct alleged to be unlawful in the complaint was the employee's discharge, not his earlier conditional reinstatement. With respect to that discharge, the adverse employment decision occurred and the statutory period began to run when the Respondent effectuated the award by terminating the employee following his election to the office of union president.

Here there was nothing conditional about the final decision of the Coast Appeals Officer entered on October 27, 2009, the date of the alleged unlawful act subjecting Aldape to work related penalties. In his brief, counsel for the General Counsel, argues that the 10(b) period was somehow reactivated in the Droege grievance since the arbitrator and the Coast Appeals Officer reinstated a portion of the penalty that had been suspended from the Droege case in their Bebich decision. In Bebich the Coast Appeals Officer issued his decision on December 29, 2009, within the 10(b) period.

It is not the consequences but the unlawful action that commences the 10(b) period. Here Aldape was on notice on October 27, 2009, of the alleged unlawful action by the Coast Appeals Officer's final decision. While part of the penalty that had been suspended in Droege was reinstated as a result of the finding of an additional violation in Bebich in December 2009, the essential unlawful act had already taken place in October which commenced the 10(b) period. Accordingly, the alleged unlawful acts surrounding the Droege 13.2 grievance occurred over 6 months before filing and service of the charge herein against ILWU. I will dismiss those allegations surrounding the Droege grievance.

ILWU argues that the conduct surrounding the Bebich grievance also occurred outside the 10(b) period. ILWU inconsistently argues that ILWU took no part in processing the Bebich 13.2 grievance but that by November 17, 2009, when the first

[18] GC Exh. 11.
[19] GC Exh. 1(a).
[20] GC Exhs. 1(b) and 1(c).

arbitration hearing took place Aldape should have been aware of ILWU's role in the grievance. Notwithstanding this argument, as noted above, Board law is clear that the 10(b) period will not run until a final adverse employment decision is made and communicated to an employee. In this case there was no final decision in the Bebich case until the Coast Appeals Officer's decision of December 29, 2009, well within the 10(b) period.

2. Did Aldape's conduct fall within the Protection of Section 7 of the Act?

Counsel for the General Counsel contends that solely intraunion activity such as that engaged in by Aldape is protected by Section 7 of the Act citing *Stage EmployeeIATSE* Local 769, 349 NLRB 71 fn. 2 (2007); *Town & Country Supermarkets*, 340 NLRB 1410, 1410, 1430 (2004); *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 178 (1997); *Teamster's Local 186*, 313 NLRB 1232, 1234–1235 (1994); *Independent Dock Workers Local 1*, 330 NLRB 1348, 1352 (2000).

ILWU argues to the contrary that Aldape's conduct was not the type of activity encompassed by Section 7 citing *OPEIU, Local 251 (Sandia Corp., d/b/a/ Sandia National Laboratories),* 331 NLRB 1417, 1424 (2000).

> Section 7 of the Act states in pertinent part:
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

In *Sandia*, the dispute was essentially an intraunion factional quarrel over intraunion policies and politics. Rival union factions had a dispute over the payment of union funds to a law firm in settlement of a lawsuit. Ultimately one faction was expelled from the union over this internal union matter. The expulsion of the union members did not affect their employment relationship with Sandia National Laboratories.

Prior to *Sandia* the Board had held that internal union discipline for engaging in intraunion politics violated Section 8(b)(1)(A) of the Act without any meaningful correlation to the employment relationship and policies of the Act. *Carpenters Local 22 (Graziano Construction),* 195 NLRB 1 (1972). However, in *Sandia* the Board expressly overruled *Granziano* and held at page 1418:

> [W]e find that Section 8(b)(1)(A)'s proper scope, in union discipline cases, is to proscribe union conduct against union members that impacts on the employment relationship, impairs access to the Board's processes, pertains to unacceptable methods of union coercion, such as physical violence in organizational or strike contexts, or otherwise impairs policies imbedded in the Act.

In elucidating on whether, intraunion activity is protected by Section 7 of the Act the Board said in *Sandia* at 1424:

> Our dissenting colleague contends that the Respondent's discipline here contravenes a policy of the Act: that the discipline interferes with the Section 7 right to concertedly oppose the policies of union officials**.** We disagree. Our colleague overlooks that the right to concertedly oppose the policies of union officials is protected by Section 7 if that activity is "for the purpose of collective bargaining or other mutual aid or protection. . . ." That protection is broad but not unlimited and it assumes that the activity bears some relation to the employees' interests as employees.

In two cases following *Sandia,* the Board first analyzed whether the employees' intra union activities implicated the employment relationship. In *United Steelworkers of America Local 9292, AFL–CIO, CLC (Allied Signal Technical Services Corp.),* 336 NLRB 52, 54 (2001), the Board found arguably that an employee who filed internal charges over a union president's handling of the grievances was exercising his Section 7 right to question the adequacy of his Union's representation of the bargaining unit and to seek to redirect his union's policies and strategies for dealing with his Employer. Thus, by disciplining the employee for filing the charges, the union arguably restrained the employee in the exercise of his Section 7 rights within the meaning of Section 8(b)(1)(A). In*Service Employees Local 254 (Brandeis University),* 332 NLRB 1118, 1122 (2000), the Board began its analysis by determining which Section 7 rights were affected by the union removing an employee from his positions both as shop steward and union representative on the contractually created Labor-Management Committee. The Board concluded that the employee had been engaged in exercising his Section 7 right to "assist labor organizations." Additionally, the Board found, to the extent he was elected to these positions by his fellow employees, the employee's service as a union representative implicated the Section 7 right of his fellow employees "to bargain collectively through representatives of their own choosing."

Thus, since *Sandia,* union discipline of employees for their intraunion activity is proscribed only if it interferes with the employment relationship, impairs access to the Board's processes, or pertains to unacceptable methods of union coercion, such as physical violence. However, as the Board noted in *Sandia,* there is a threshold issue that must be resolved before it is determined if intraunion discipline impacts the employment relationship in violation of Section 8(b)(1)(A) of the Act. First it must be established that the employee's intraunion activity is protected by Section 7. To gain the protection of Section 7 the employee's intraunion activity must bear some relation to collective bargaining or other mutual aid or protection, i.e., "the activity bears some relation to the employees' interests as employees" not merely intraunion interests.

In the cases cited by counsel for the General Counsel, *Mobil Oil Teamster's Local 186*, and *Independent Dock Workers Local,* supra were pre-*Sandia*. In addition in *Stage Employees, IATSE Local 769* and *Town & Country, supra* the disciplined employees' activity included conduct encompassed by Section 7 including protesting the ratification of a collective-bargaining agreement and failure to operate a hiring hall in a nondiscriminatory manner.

In this case, as in *Sandia,* Aldape's conduct was purely intra local factional quarrelling over how the ILWU should be operated. Aldape engaged in vitriolic and unsubstantiated attacks against not only fellow union members but members of their

families. His attacks were not limited to those who held union office but to anyone Aldape perceived as opposed to his position, including Jurisic and Bebich who were not ILWU office holders at the times of his libelous and slanderous statements.

Aldape's handbill in the Droege grievance, which scurrilously accused Jurisic's children of failing a drug and alcohol test, deals solely with intra union politics and bears no relation to collective bargaining or other "employees' interests as employees." Aldape's phone message that was the subject of the Bebich grievance was no more than an unveiled threat to disclose personally embarrassing facts about Bebich and has no relation to collective bargaining or other mutual aid or protection. Aldape's flyer in the Realini case dealt with internal union matters concerning mechanics, internal union meetings and motions at union meetings concerning dispatch of mechanics. These topics are all matters that bear no relation to collective bargaining or other mutual aid or protection or to "employees' interests as employees." I find that Aldape's intraunion activities that were the subject of the three 13.2 grievances were not protected by Section 7 of the Act. Accordingly, I will dismiss the remaining allegations of the complaint.

CONCLUSIONS OF LAW

1. Respondent PMA and its employer members is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. ILWU is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's did not violate Sections 8(a)(1) or 8(b)(1)(A) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[21]

ORDER

IT IS ORDERED that the complaint is dismissed in its entirety.

Dated, Washington, D.C., September 26, 2011.

[21] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.